IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 30 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KUVARBEN VIRAMBAI WD/O VIRAM RAMDE - Appellant(s)
Versus
RASID MUSA - Defendant(s)

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Appearance :
MS KALPANA BRAHMBHATT ON BEHALF OF MS VASUBEN P SHAH for Appellant NOS. 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4,1.2.5
MR NIRAJ BUCH ON BEHALF OF MR ND NANAVATI for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 06/09/2006

ORAL JUDGMENT

1. Heard Ms.Kalpana Brahmbhatt, learned counsel for the appellants and Mr.Niraj Buch, learned counsel for the

respondent.

2. The dissatisfied defendants who had suffered decree for dispossession and have also suffered a decree for enhanced compensation under the hands of the appellate court, are before this court submitting inter-alia that the learned court below were absolutely unjustified in granting decree for possession and were also wrong in awarding mesne profit at the rate of Rs.85.00 per month. The plaintiff had filed the suit to recover the possession of one room and one Oradi which were illegally occupied by the defendants and to recover Rs.400.00 for use and occupation of the premises by defendants. The defendants contended that the property in their possession was part of demised premises and that they had made no encroachment.

3. The learned trial court while granting decree of dispossession also made a decree for mesne profit for payment of Rs.10.00 per month in favour of the plaintiff. The learned first appellate court, disagreeing with the submissions made by the defendants, while dismissing the appeal further held that the defendants are liable to

pay a sum of Rs.60.00 and Rs.25.00 respectively towards illegal use and occupation of one room and Oradi, per month from 1/9/1978.

4. The appeal has been admitted for hearing the parties on 12/2/1986 on the following substantial questions of law;

(i) Whether the Civil Court had jurisdiction to pass a decree for possession of the suit premises which being apportioned to the rented premises were part to the rented premises and hence only the Rent Court under the Bombay Rent Act had jurisdiction to entertain the suit to pass such a decree?.

(ii) Whether the lower appellate court has materially erred in law in not interfering from Exh.77 and every evidence on record that the late Virambhai was occupying the suit premises as a tenant from the very beginning and hence, he was the tenant of the suit premises?.

(iii) Whether the lower appellate court has materially erred in law by substituting the decree of the trial court for mesne profit at the rate of Rs.10.00 p.m. from February, 1980 by

the decree for mesne profit at the rate of Rs.85.00 p.m. from 1st September, 1978 in the appeal filed by the appellants even though neither there was any cross-objection filed by the respondent nor there was any cross appeal filed by him?.

5. Learned counsel for the appellants firstly contended that in view of the allegations made by the defendants that the suit premises were also part of the rented premises, the Civil Court would have no jurisdiction. In the opinion of this Court, in view of the findings recorded by the two courts that the premises were not part of the rented premises / demised premises, the plaintiff was not required to approach the Rent Court and in a case of trespass where the suit is on title, the Civil Court would certainly have jurisdiction.

6. So far as the question No.2 is concerned, in view of the findings recorded by the two courts that the defendant was in illegal occupation of the premises, there is no scope to hold that late Virambhai was occupying the suit premises as a tenant from the very beginning and as such, he being a tenant, the defendants could not be

ordered to be evicted from the suit premises.

7. So far as the third question is concerned, in the considered opinion of this Court, learned first appellate court could not grant a decree for mesne profit for sums of Rs.60.00 and Rs.25.00 respectively, for illegal use and occupation of a small room and Oradi. If the trial court in its wisdom had made an order for payment of Rs.10.00, then that was the end of the matter for the trial court and if the plaintiff was aggrieved of the said findings, then he was required to file a separate appeal or cross-objections in the appeal filed by the defendants.

8. In a given case, in accordance with Rule 12 Order 20 of the Code of Civil Procedure, Court may grant damages or allow mesne profit or may direct an inquiry into the mesne profits. If the plaintiff seeks a decree for an inquiry, or the court is not in a position to ascertain that what mesne profit should be granted, then the court has to issue a direction for holding an inquiry into the execution for grant of the mesne profit, but in case the court grants a decree allowing mesne profit, then the decree would be final for that court and the appellate

court would not be entitled to interfere in the said decree, unless the plaintiff files an appeal or cross-objections. The directions issued by the learned first appellate court in its impugned judgement are set aside with the direction that the defendants would be liable to pay a sum of Rs.10.00 (Rupees Ten only) per month from 1/9/1978 till the delivery of the possession to the plaintiff.

9. The appeal to the extent indicated above is allowed. No costs.

10. Let a decree be framed accordingly.

(R.S.GARG,J.)

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